No. 86-186

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DAY & ZIMMERMANN, INC., Petitioner

v.

INTERNATIONAL CHEMICAL WORKERS UNION
and LOCAL 526 OF THE INTERNATIONAL
CHEMICAL WORKERS UNION

On Petition for a Writ of Certiorari to
the United states Court of Appeals for
the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents believe the question presented should be stated as follows:

Whether the court of appeals correctly held that the arbitrator, in fashioning the remedy for a violation of the parties' collective bargaining agreement, should take into account subsequent contract changes in determining what prospective relief, if any, should be ordered.

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STATEMENT OF THE CASE

This action was brought by respondents International Chemical workers Union and its Local 526 (hereinafter referred to collectively as the Union) under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, to declare valid and to enforce an arbitration award rendered pursuant to a collective

bargaining agreement between the Union and petitioner Day & Zimmermann, Inc. (hereinafter referred to as the Company). The Union represents a unit of production, maintenance, and other employees at the Lone Star Army Ammunition Plant, which is operated by the Company under a contract with the United States Army. The facility is owned by the United States.

The arbitration proceeding arose out of a grievance filed by the Union which claimed that the Company had violated the parties' collective bargaining agreement by assigning to the U.S. Army Corps of Engineers certain road work customarily performed by bargaining-unit employees. After a full hearing, the arbitrator determined that the Company had violated a provision of the agreement which precluded the performance by non-bargaining unit personnel of "work customarily done by those employees included in the bargaining unit." However, the arbitrator did not immediately order a remedy for this violation. Instead, he directed

the parties to attempt to negotiate an appropriate remedy, and retained jurisdiction to resolve the matter "in the event the parties cannot agree." (Pet. A-87)

One reason the arbitrator gave for not immediately resolving the remedy issue is that, after the grievance arose, the parties had entered into a new collective bargaining agreement (the old one having expired) which appeared to have an impact on the matter. As the arbitrator stated (Pet. A-86):

> It is also noted that language changes in the current collective bargaining agreement, which became effective in April, 1981, may, or may not, allow the Corps of Engineers, its contractors and/or subcontractors to perform road maintenance work customarily done by members of the bargaining unit; and, if so, the effective date of the current contract could possibly act as an effective time limit or bar for wage claims under the grievance in the instant case.
>
> Although it has been determined the contract was violated when maintenance and repair work on streets within the plant site was performed by persons not in the bargaining unit, I am reluctant to concoct a remedy awarding pay and/or a cease and desist directive in view of the above unknown factors.

In this action, the Company contended that the award was invalid in all respects. It argued that (a) the arbitrator had exceeded his authority, (b) the award was contrary to the clear language of the contract, (c) the award could not affect the rights of the Army Corps of Engineers, which was not a party to the proceeding, (d) the Company could not prevent the Army Corps of Engineers from performing the work in question, (e) if the Company was obligated to prevent the Army Corps of Engineers from performing the work, this obligation was also shared by the Union, (f) no damages could be assessed against the Company, and (g) the language of the new collective bargaining agreement precluded the award from having any effect beyond the expiration date of the old agreement. (See Pet. A-38 to A-40)

All of these contentions were considered and rejected both by the district court and the court of appeals. The district court's order, which was affirmed by the court of appeals, declared the arbitrator's award to be valid in all respects and remanded the case to the arbitrator:

> "for clarification of the issue of who should receive a monetary payment under this award, what amount of money each individual should receive, and whether this award has prospective application under collective bargaining agreements entered into between the parties subsequent to the expiration of the 1978-1981 agreement." (Pet. A-28)

Of all the issues raised below, the Company has selected only one to bring before this Court in its petition for certiorari. The Company contends here that the courts below erred in directing the arbitrator to consider the possible impact of the new collective bargaining agreement on the issue of what prospective relief, if any, should be provided for the violation of the prior contract. Somewhat surprisingly, the Company seems to be suggesting that the arbitrator must ignore the new contract, even though it contains language that may affect the employees' right to perform the work in question.

The court of appeals rejected this contention on the following grounds:

> The arbitrator must devise a remedy in this case. In so doing, the arbitrator must be given broad discretion. Enterprise Wheel, 363 U.S. at 597, 80 S.Ct. at 1361,

> 4 L.Ed.2d at ___. The district court merely pointed out to the arbitrator that there is a later agreement and that it also has different terms. These are facts that the arbitrator may properly consider in fashioning his remedy. See Oil, Chemical & Atomic Workers v. Rohm, 677 F.2d 492, 495 (5th Cir. 1982) (remand to arbitrator appropriate "when issues submitted were not fully resolved"). Of course, the company will be able to attack the remedy later if it is not based upon the "essence" of the applicable bargaining agreements. We affirm the district court's upholding of the arbitration award and the remand to the arbitrator to construct an appropriate remedy to enforce it. (Pet. A-23 to 24)

ARGUMENT

This case was correctly decided by the district court and the court of appeals, and presents no issue warranting review by this Court.

The Company no longer challenges the decisions below insofar as they held (1) that the grievance in this case was subject to arbitration, and (2) that the aribtrator's determination that the Company had violated its contract by assigning certain road work to non-bargaining unit personnel was valid and enforceable. Nor does the Company challenge the lower courts' decision that the case must be remanded

to the arbitrator to fashion an appropriate remedy.

The sole issue raised by the Company is whether the courts below were correct in directing the arbitrator to consider the possible impact of the parties' subsequent contract in determining what prospective relief, if any, is appropriate. However, as the court of appeals noted, the existence of this new contract is a fact which, along with any other relevant facts, may properly be taken into account by the arbitrator in fashioning his remedy.

In United Steelworkes v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), this Court emphasized that when an aribtrator is "formulating remedies" under a collective bargaining agreement, "the need is for flexibility in meeting a wide variety of situations," and the arbitrator may "look for guidance from many sources" so long as his award "draws its essence from the collective bargaining agreement." Certainly it is appropriate for an arbitrator to at lease attempt to tailor his remedy in such a way as not to conflict with any new agreement the parties may have entered into after the

grievance arose.

The Company argues that the court below has, in effect, directed the arbitrator to interpret the new collective bargaining agreement "without a finding by the district court that such was an arbitrable matter." On this basis, it contends that the decision below is in conflict with AT&T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415 (1986), in which this Court held that before ordering arbitration of a grievance a court must decide that the controversy is subject to arbitration under the applicable contract. But here the courts below did determine that the grievance which is the subject of this case is arbitrable, and that the arbitrator, having found a contract violation, has authority to fashion a remedy. Nothing in the AT&T case suggests that, in such a situation, the arbitrator may not consider all relevant factors--including any new agreement between the parties--in determining what the remedy should be.

At this stage, there is no indication that the parties have any dispute as to the meaning of their new contract; if there is no such dispute, of course, there would be no need for the arbitrator to interpret the new contract. If it should develop, however, that the parties do have some disagreement as to the meaning of their new contract, and the arbitrator believes it necessary to decide that dispute in order to decide the remedy issue before him, then he would have no choice but to do so. Such a decision by the arbitrator would be nothing more than the exercise of his authority to fashion an appropriate remedy for the Company's violation of the old agreement.

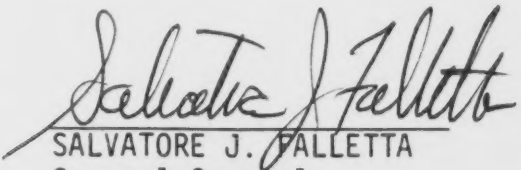
This Court's decision in United Steelworkers v. Enterprise Wheel & Car Corp., supra, recognized that an arbitrator's authority to decide disputes arising under a contract includes the authority to fashion a remedy for any violation. If the exercise of that authority requires an interpretation of a subsequent agreement, then the aribtrator must necessarily make such an interpretation. This is simple common sense, and nothing in the AT&T case or any

other decision of this Court is to the contrary.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that before midnight September 19, 1986, I have caused to be deposited in the U.S. Mails, Certified Return Receipt Requested, the following number of copies of Respondents' Brief in Opposition to the following parties:

40 copies: Joseph F. Spaniol, Jr., Clerk
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